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State v. Dunlap Respondent's Brief Dckt. 43220

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 43220
Plaintiff-Respondent,)	
)	Ada County Case No.
v.)	CR-2013-6699
)	
ALLISSA BREEANNA DUNLAP,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Dunlap failed to establish that the district court abused its discretion by imposing a unified sentence of 10 years, with two years fixed, upon her guilty plea to grand theft?

Dunlap Has Failed To Establish That The District Court Abused Its Sentencing Discretion

Dunlap pled guilty to grand theft and the district court imposed a unified sentence of 10 years, with two years fixed. (R., pp.71-74.) Dunlap filed a notice of appeal timely from the judgment of conviction. (R., pp.76-78.)

Dunlap asserts her sentence is excessive in light of her mental health issues, difficult childhood, substance abuse, family support, acceptance of responsibility, and purported remorse. (Appellant's brief, pp.3-7.) The record supports the sentence imposed.

The length of a sentence is reviewed under an abuse of discretion standard considering the defendant's entire sentence. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007) (citing State v. Strand, 137 Idaho 457, 460, 50 P.3d 472, 475 (2002); State v. Huffman, 144 Idaho 201, 159 P.3d 838 (2007)). It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. Id. (citing State v. Trevino, 132 Idaho 888, 980 P.2d 552 (1999)). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)). To carry this burden the appellant must show that the sentence is excessive under any reasonable view of the facts. Baker, 136 Idaho at 577, 38 P.3d at 615. A sentence is reasonable, however, if it appears necessary to achieve the primary objective of protecting society or any of the related sentencing goals of deterrence, rehabilitation or retribution. Id.

The penalty for grand theft is not less than one year, up to 14 years in prison. I.C. § 18-2408(2)(a). The district court imposed a unified sentence of 10 years, with two years fixed, which falls well within the statutory guidelines. (R., pp.71-74.) At sentencing, the state addressed the harm done to the victim, Dunlap's ongoing theft-related offending, her failure to pay any restitution for the instant offense despite having been given time to do so, her disregard for the conditions of community supervision and

failure to appear for court hearings, her failure to rehabilitate despite prior treatment opportunities, and the risk she presents to the community. (Tr., p.20, L.24 – p.25, L.12 (Appendix A).) The district court subsequently articulated its reasons for imposing Dunlap's sentence. (Tr., p.35, L.24 – p.36, L.16 (Appendix B).) The state submits that Dunlap has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpts of the sentencing hearing transcript, which the state adopts as its argument on appeal. (Appendices A and B.)

Conclusion

The state respectfully requests this Court to affirm Dunlap's conviction and sentence.

DATED this 23rd day of December, 2015.

/s/
LORI A. FLEMING
Deputy Attorney General

VICTORIA RUTLEDGE
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 23rd day of December, 2015, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

REED P. ANDERSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

_____/s/_____
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

17

18

1 that, Mr. Loschi.
2 Ms. Dunlap, disregard what I just said.
3 You do not need to check in with the presentence
4 department.

5 THE DEFENDANT: Okay.
6 (The proceedings concluded.)
7 --o0o--

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1 April 24, 2015
2 BOISE, IDAHO

3
4 THE COURT: State of Idaho vs.
5 Allissa Dunlap, FE-13-06699.

6 MS. KELLY: Tamera Kelly for the State.
7 MR. LOSCHI: Jon Loschi for the defendant,
8 who is present.

9 I have some documents I would like to
10 have handed to the Court, if I can have them back.
11 I did show them to Ms. Kelly. It's identification
12 of a bed available at Rising Sun, and the others
13 reflect the programs that she has done while in
14 custody. I think I gave you a duplicate of one of
15 them.

16 THE COURT: I wanted to make sure I wasn't
17 missing something.

18 Do you want me to keep one of the
19 copies for some reason, or do you want them back?

20 MR. LOSCHI: No, we can take them back.

21 THE COURT: All right.

22 MR. LOSCHI: And also I want the record to
23 reflect, I think I e-mailed you and the prosecutor
24 the Mental Health Court assessment. And that had
25 been done in Canyon County. And I informed you by

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1 e-mail that she had been granted probation in
2 order to complete Mental Health Court's
3 determination of probation in the Canyon County
4 probation violation.

5 THE COURT: Yes. I have that e-mail, as
6 well as the mental health evaluation that was
7 attached to your e-mail. And I have included that
8 in the PSI materials. So I appreciate that.

9 And I did review the PSI materials --
10 well, it's APSI materials, is probably the more
11 accurate way to describe it. It's this letter,
12 dated June 24, 2013, from the Department of
13 Corrections, addressed to Judge Ford, and then all
14 of the attachments to that.

15 And so I know the parties were provided
16 with that back in September. But because today is
17 sentencing, I want to confirm on the record you
18 have reviewed that.

19 MR. LOSCHI: Yes.

20 MS. KELLY: Yes, Your Honor.

21 THE COURT: Thank you.

22 And then there was a presentence report
23 from March 2, 2012, that was also in front of
24 Judge Ford. And then the prosecuting attorney
25 sent PSI documentation, police reports,

1 accompanying a letter dated August 25, 2014.

2 And just again confirming for the
3 record, both parties have reviewed all of those
4 materials?

5 MS. KELLY: Yes, Your Honor.

6 MR. LOSCHI: Yes, Your Honor.

7 THE COURT: Okay. It has taken us a long
8 time to get to sentencing in this case.

9 Is there any legal cause why we cannot
10 go forward this morning?

11 MR. LOSCHI: No, Your Honor.

12 MS. KELLY: No, Your Honor.

13 In regard to the documentation, I would
14 add that the last time we were in court, I gave
15 Your Honor a police report from the Nampa Police
16 Department. And that's incident No. N1507135.

17 Does Your Honor have that, as well?

18 THE COURT: Yes, I do.

19 MR. LOSCHI: We're ready to go. We have
20 reviewed all of that.

21 THE COURT: Ms. Kelly, whenever you're
22 ready.

23 MS. KELLY: Thank you.

24 Your Honor, in this case, with the
25 defendant's plea to grand theft, the State is

21

1 asking the Court enter a judgment of conviction
2 with an underlying sentence of two years fixed,
3 followed by eight indeterminate, for a total of
4 ten.

5 The State is requesting that the Court
6 order the defendant to pay a public defender
7 reimbursement of \$500, as well as restitution in
8 this case of \$2,520. And I do have an order for
9 the Court in regard to that restitution amount.

10 The State, in this case, is asking that
11 that sentence be imposed. And the State is asking
12 that for several reasons. I understand that in
13 Canyon County she was sentenced to something very
14 different. But I still have to look at my case
15 and the conduct that occurred in this case, and I
16 think that that gives reason for a penitentiary
17 sentence.

18 The defendant, in this case, worked for
19 the crime victim. The crime victim is Ms. Biel.
20 She's 86 years old. The defendant was cleaning
21 her home. During that time that she was cleaning
22 the victim's home, she took jewelry from the
23 victim. This was jewelry that was very
24 significant to Ms. Biel. This was her deceased
25 husband's jewelry, past wedding rings that they --

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1 committed two new petit theft crimes. The first
2 one was just after her guilty plea. I have that
3 she pled guilty in August 2014. She was charged
4 with a petit theft crime September 22, 2014. She
5 failed to appear in that case, and has later pled
6 guilty. I think she pled guilty at the end of
7 March.

8 After she failed to appear in this case
9 in October of 2014, a bench warrant was issued for
10 her arrest. She was later found by the Nampa
11 Police Department at a grocery store in Nampa.
12 And she was charged with petit theft and false
13 information to a law enforcement officer. She has
14 since pled guilty to that petit theft charge, and
15 that false information was dismissed.

16 In regard to -- also in regard to this
17 case, the State feels that the defendant really
18 has shown no remorse for her actions in regard to
19 theft. Theft is something that has been rampant
20 in her criminal history. Basically, her criminal
21 history is all theft. And she continued to do it
22 while this case was pending.

23 She never paid any money in upfront
24 restitution, despite the attempts the State gave
25 her, the time that the State gave her to make

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1 that he was given from her. And she has had plans
2 to give that to her sons when she died.

3 In regard to restitution, the State had
4 made several set-overs to give the defendant time
5 to pay some upfront restitution. And, mainly, the
6 State did that so Ms. Biel -- what Ms. Biel really
7 wanted was the restitution back, I think, earlier,
8 because her comments to me were, basically, she
9 doesn't plan on being on this earth too much
10 longer, and she would like to give that jewelry to
11 her sons before she dies.

12 Ms. Biel was unable to make it this
13 morning, though she has kept in fairly good
14 contact with me. She stated that she just wasn't
15 feeling well. And this was set earlier in the
16 morning. She thought it would be too difficult
17 for her to be here.

18 In regard to this case, I think the
19 defendant has shown to the Court that she's not
20 amenable to probation at all and cannot be
21 trusted. She violated her probation in her
22 Canyon County case while this case was pending.
23 She failed to appear at the time that sentencing
24 was originally set in this case.

25 While this case was pending, she

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1 those payments. She had represented to the Court,
2 at the time, that she was employed and needed more
3 time to make those payments, but that never did
4 occur.

5 I think it's also flagrant that she
6 commits that new theft crime while this case was
7 pending, lied about her identity, I think, to
8 avoid being arrested on the warrants. I think she
9 likely knew about the warrants.

10 The State contacted the Ada County
11 Sheriff's Office, who some deputies are
12 cross-deputized where they can actually seek our
13 warrants in Canyon County. Deputy Piccola of the
14 Ada County Sheriff's Office had several attempts
15 to look for the defendant, and concluded back to
16 me in an e-mail that she's hiding; I can't find
17 her; I have contacted her family; her family will
18 tell me where she's at; her mother is pretty upset
19 with her; her mother told me she would tell me
20 where she's at.

21 And he was unable to locate her in
22 Canyon County. And so I think that the time she
23 was found on this case was when she was arrested
24 for the misdemeanor petit theft.

25 She could -- my understanding is

25

1 Mr. Loschi could ask for an additional Rider in
2 this case. And I would disagree with that. I
3 think she has had one fairly recently in 2012.
4 And I'm not sure what much more she would gain
5 from a second period of retained jurisdiction in
6 such a short period of time.

7 In regard to specific deterrence of
8 protecting society, this is a defendant that
9 deserves penitentiary time. She was able to gain
10 the trust of people and violate that trust, and I
11 think in a very flagrant manner. She has had
12 prior chances of rehabilitation.

13 I would add that in that mental health
14 evaluation, it really doesn't add much about this
15 case. I don't know that that's atypical, though,
16 because the mental health evaluation was from
17 Canyon County. And they may not be too concerned
18 about the crimes that she has committed in other
19 counties, probably more concerned about the
20 treatment. But I would add that it didn't seem
21 like that was much of a consideration in regard to
22 that mental health -- this crime was not a
23 consideration in regard to that mental health
24 evaluation.

25 If Your Honor chose to place Ms. Dunlap

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1 contact with Ms. Biel.

2 Has she changed her viewpoint about
3 what she would hope would happen in this case?

4 I know, initially, she wanted some kind
5 of probation sentence so that the defendant could
6 give her restitution.

7 But in light of the history, has she
8 changed her mind?

9 MS. KELLY: I think that she is fairly
10 frustrated with how long it has taken. In our
11 conversations, she no longer talks about the
12 restitution anymore. And so I took that to -- I
13 take that as her thinking that's kind of like a
14 foregone issue, she's not going to get that money
15 back.

16 I did share with the victim that the
17 defendant had gotten a new criminal law violation
18 while this case was pending. And that was pretty
19 upsetting to her. And she was -- she did call me
20 several times when the warrant was issued in this
21 case, seeing if there was any possibility that
22 this case could get resolved sooner.

23 And I told her we would contact
24 Deputy Piccola of the Ada County Sheriff's Office
25 and try to get the defendant picked up on a

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1 on a concurrent probation with Canyon County, the
2 State would ask that she be ordered to serve
3 additional jail; and that, specifically in her
4 judgment, she be ordered to pay \$50 per month to
5 restitution to Ms. Biel, because the State
6 believes Ms. Biel deserves to be repaid
7 restitution before she dies.

8 I note that the letter she provided to
9 the Court mentioned she would live at the
10 Rising Sun in Ada County. But she is going to --
11 if she was placed on probation, she would be a
12 Mental Health Court participant in Canyon County.
13 So I think that that might be tough to supervise
14 her, when she's not living in the same county as
15 where she's seeking most of her treatment and
16 services.

17 And so in regard to that, I would ask
18 that -- I guess the Court could maybe rule upon
19 that in their sentencing. But I have a concern
20 about her living here, but seeking treatment in
21 Canyon County.

22 That's all I have. Thank you,
23 Your Honor.

24 THE COURT: I have a couple of questions.
25 It sounds like you've had recent

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1 warrant. And I wasn't able to get that done.

2 THE COURT: Just so you know -- maybe you
3 already knew this -- I will always move a time for
4 a victim to attend. The idea she couldn't come
5 too early in the morning is concerning for me. I
6 would be happy to move it at any time convenient
7 to her.

8 MS. KELLY: Yes, Your Honor. And I asked
9 her about that, and she said it was fine to go
10 ahead at the 9 o'clock hour.

11 THE COURT: Thank you for that.

12 MS. KELLY: And I'm also asking for a
13 no-contact order with her. And I have that order
14 with restitution for the Court.

15 MR. LOSCHI: Judge, by way of her history,
16 so she commits at the end of 2011 the offense in
17 Canyon County. She's put on probation April 2012.
18 She PVs September 2012. She is arrested on a
19 probation violation warrant in January 2013, and
20 then commits this offense while that PV is
21 pending. And then August -- and then afterwards
22 gets sent on a Rider in Canyon County, goes on the
23 Rider, and comes back. In August 2013, she's put
24 on probation. So the warrant is out. She comes
25 here, and she's present in this case.

APPENDIX B

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1 and talking to her about it and corresponding with
2 Mental Health Court or the PD out in
3 Canyon County, it's not something very
4 time-intensive for me. And I'd also like the
5 money to be paid towards restitution.

6 And so I'm going to ask you to place
7 her on probation concurrently with Canyon County.
8 If you want to put her on a very specific, you
9 know, initial repayment plan, that sort of thing,
10 or maybe some wording in there that, you know,
11 it's a fundamental condition of my probation that
12 the probation officer try to facilitate her
13 getting restitution paid as soon as possible,
14 prioritizing it, I guess, over other things, I
15 don't have any problem with that. I think that's
16 ultimately what's going to make the victim in
17 this case happiest, is getting the restitution
18 back, as opposed to any continued incarceration
19 for Allissa.

20 She has been trying to make productive
21 use of time in the Canyon County Jail. Those are
22 things that I showed you, the different groups and
23 classes and those sorts of things. So she's, you
24 know, I think, geared to change.

25 The fact of the matter is that if she

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1 say?

2 THE DEFENDANT: Yes, ma'am.

3 I would like to start by saying that I
4 apologize not only to the Court, but to you, as
5 well. I am sincerely sorry for what I did. And
6 there's no justification or excuse for what I did.
7 My actions are horrible, and I am truly sorry. I
8 do feel bad. I think about it every day.

9 I do want to pay the victim back. That
10 is my intention. That is the reason I sought out
11 sober living. It's going to be funded, so I don't
12 have to worry about expenses, other than my
13 expenses so I can focus on paying back. I don't
14 want to continue to make that a stressor for her.
15 And I want to make it right.

16 I have learned a lot. And I am trying
17 to better myself. I have been going to substance
18 abuse and support group classes. I haven't missed
19 one since being incarcerated. And I think Mental
20 Health Court would help me a lot. And I just hope
21 to have the opportunity.

22 Thank you.

23 THE COURT: Thank you.

24 If I thought that there was any chance
25 at all that you would pay the restitution, then I

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1 gets out of Mental Health Court, she messes around
2 or steps out of the picture or something like
3 that, she's going to get arrested pretty quickly.
4 And she's going to be back in front of the Court
5 with nothing left to argue, and then she's going
6 to prison, if she's given this opportunity at
7 Mental Health Court.

8 So I am going to ask you to, I guess,
9 just defer to Judge Ryan's decision, because
10 they're willing to work with her over there and
11 put the time and the effort and the money into it,
12 I think, to giving her some programming; and put
13 her on a concurrent period of probation here and
14 order the restitution, but not to order any other
15 public defender reimbursement or fines,
16 Your Honor.

17 THE COURT: Is it Judge Ford or Judge Ryan?

18 MR. LOSCHI: It's whoever you think it is.
19 I can't remember. It's four letters.

20 THE COURT: Yeah, some Canyon County judge.

21 All right. Ms. Dunlap, you have a
22 right to make a statement. You also have a right
23 to remain silent. But if you would like to say
24 something, this is your time.

25 Is there anything you would like to

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1 would give more serious consideration to
2 probation. If I thought that there were any
3 chance at all that you wouldn't violate your
4 probation, and that you wouldn't commit new crimes
5 on probation, then I would give more serious
6 consideration to probation.

7 This crime and your criminal history
8 and your conduct after you committed this crime
9 have convinced me that you have earned a prison
10 sentence.

11 Based upon your plea of guilty on
12 August 22, 2014, to grand theft, I'm going to
13 impose a judgment of conviction, a sentence of ten
14 years, consisting of two years fixed, followed by
15 eight years indeterminate. That sentence will be
16 imposed.

17 You will have court costs to pay. You
18 will not have a fine. You will not have public
19 defender reimbursement. You will have restitution
20 in the amount of \$2,520.

21 I'm going to impose a no-contact order
22 with Caroline Biel. There are no exceptions to
23 that no-contact order. Even if you wanted to
24 write her a letter of apology, this no-contact
25 order prohibits you from doing that.